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Issue Date: 12 June 2003

CASE NO.: 2002-LHC-02101

OWCP NO.: 13-99981

In the matter of

LINDA CAMPBELL
Claimant,

v.

MWR FUND, DAVIS-MONTHAN AIR FORCE BASE, ARIZONA,
Employer.

Appearances:

Kurt A. Gronau, Esq.
for Claimant

David Christenson, Esq.
for Employer

Before: Gerald Michael Etchingham
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

Claimant, Linda Campbell, filed a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et. seq.*, and as extended by the Non-Appropriated Funds Instrumentalities Act, 5 U.S.C. § 8171 *et. seq*. (the "Act"), for injuries suffered on April 28, 1998, while she was working for the Employer, Davis-Monthan Air Force Base as a barber. A formal hearing was held in Tucson, Arizona on December 19, 2002. All parties, except the Director of the OWCP, were represented by counsel. The following exhibits were admitted into evidence: Claimant's Exhibits ("CX") 1-7, Employer's Exhibits ("EX") 1-28, and Administrative Law Judge's Exhibits ("ALJX") 1-11 with ALJX 10 being Claimant's closing brief, and ALJX11 being Respondent's counsel's denied January 17, 2003 letter request for an extension of time to file a closing brief.. The parties called witnesses, offered documentary evidence and submitted oral arguments. This Court took the matter under submission and invited post-trial briefs by the parties which were submitted only by Claimant. Respondent requested an extension of time to file its own closing brief by making a request at the hearing on December 19,

2002 and virtually the same request in letter form dated January 17, 2003. Respondent's requests for an extension of time to file a closing brief were denied for failure to show good cause as Respondent's counsel provided no explanation as to why he could not file a closing brief before his January 2003 vacation. This Court duly considered the evidence submitted at trial, the admitted exhibits, and the briefs and arguments of counsel.

STIPULATIONS

The parties have stipulated to the following:

a. The Act applies in this case in its extension, the Non-Appropriated Fund Instrumentalities Act.
b. Claimant has suffered physical injuries to her right wrist and right elbow in this case.
c. At the time of the injuries in this case, an employer/employee relationship existed between the Claimant and the Employer.
d. The injuries arose out of and in the course of Claimant's employment.
e. The claim was timely noticed and timely filed.
f. The Claimant is entitled to compensation and medical benefits.
g. The Date of Claimant's physical injuries is April 28, 1998.
h. The Employer paid temporary total disability from April 29, 1998 through May 3, 1998 and from October 18, 2000 through January 8, 2002 at the rate of $171.60 per week and the total payments of same are $11, 104.95.
i. Claimant is not working.
j. That § 910(c) of the Act applies with respect to calculation of Claimant's average weekly wage.

TR[1] pp. 9-10.

ISSUES FOR DETERMINATION

The unresolved issues in this proceeding are:

1) Whether there is any causal relationship between Claimant's aggravated psychological problems and her employment with Employer?

2) What is Claimant's Average Weekly Wage for her injuries?

3) Is Employer subject to Section 14(e) penalties for the period from October 18, 2000 to February 6, 2001 when Employer filed its Notice of Final Payment (Form LS-208)?

[1]The abbreviation "TR" refers to the hearing transcript.

4) What is the date of maximum medical improvement, if any, regarding the right epicondylitis injury?

5) What is the extent of Claimant's disability resulting from her physical injuries?

6) What is the extent of Claimant's wage earning capacity, if any?

FINDINGS OF FACT

Claimant was born on September 10, 1949 making her fifty-three years old at the time of hearing. TR p.97. She graduated high school in 1967.

Claimant has a current Arizona cosmetology license and is a licensed barber. TR, pp. 97 and 132. She began working for Employer in June 1997. Id. at 97. At the same time, Claimant became a part-time sales associate at Dillard's Department Store. TR, pp. 98 and 136. Her rate of pay with Dillard's was $9.30 per hour when she left and she never worked less than 20 hours per week. TR, p. 99. She later testified, however, that once she started working as a barber her hour at Dillard's were reduced to part-time generally two to three nights per week for two to three-hour shifts totaling 4 - 9 hours per week and weekends totaling twenty hours per week.. TR, pp. 136, 138, and 159. Her hourly rate of pay with Employer was $9.33 when she last worked there in September 2000 when all barber positions were outsourced by Employer. TR, pp. 100, 110, 113 and 114. Claimant also received cash tips in her work as a barber but she did not declare them as income for income tax purposes. TR, pp. 101 and 141. Claimant's prior employment involved long-distance telephone operator, apartment manager, and beauty salon receptionist. TR, pp. 134-135.

On June 21, 1996, Claimant saw her treating physician, Dr. Schoenhals, for the first time for a general purpose office visit to establish their doctor-patient relationship. At that time, Dr. Schoenhals took a history of Claimant's past medical problems and the only comment he noted was that Claimant was being treated for depression, was on Prozac when she first came to see him, and for some reason Dr. Schoenhals changed Claimant's psychotropic medication from Prozac to Paxil to treat Claimant's depression. TR, pp. 73 and 75. Claimant testified that while she did not suffer from depression as a child, she did have depression as a teenager and when she had two children in her twenties or early thirties. TR, pp. 151-152. Claimant continued to take Paxil for her depression as of December 4, 1996 according to Dr. Schoenhals' treatment notes. TR, pp. 74 and 75.

Dr. Schoenhals' notes also reveal that Claimant was still taking Paxil for her depression when she visited him on October 20, 1997. TR, pp. 76-77. Claimant went to visit Dr. Schoenhal on November 18, 1997 but saw Dr. Schoenhals' colleague, Dr. Ruben Calvillo, another internist, instead. Dr. Calvillo's treatment notes make reference to "child depression" for Claimant in the prior medical history section of his notes. TR, pp. 77-79.

On February 19, 1998, Dr, Schoenhals, Claimant's treating physician, saw Claimant who complained of an upper back muscle spasm, muscle tension, anxiety, and right elbow pain. Claimant reported to Dr. Schoenhals that she needed only one job. Dr. Schoenhals prescribed 375 mgs. of Naprosyn for Claimant and asked her to return in a few weeks. CX7, p. 39.

Claimant testified that her problems with her right arm began in March, 1998 due to her use of the barber chair at her work. TR, pp. 102-103. In her Patient History description to Dr. Goldfarb on September 18, 2000, however, Claimant writes that her right arm/elbow problems first started in mid-1997. CX6, p. 19.

On April 29, 1998, Claimant saw Larry Putnam, M.D., a pain management specialist, concerning her right elbow pain. Dr. Putnam noted that Claimant's three-month history of right elbow pain was non-related to a specific injury or precipitating event relative to the onset of pain. He noted Claimant's employment history as a hairstylist in the Officers' Club at Davis-Monthan Air Force Base and work at Dillard's Department Store as a cashier. Dr. Putman opined that the combination of Claimant's two jobs "has resulted most likely in the onset of this pain syndrome and also in its propagation." On physical examination of Claimant, Dr. Putnam noted extreme tenderness over the right lateral aspect of the olecranon and olecranon bursa. He diagnosed this condition as right tennis elbow. The olecranon bursa was injected with epinephrine, marcaine and Depo-medrol and Claimant was excused from work on May 4, 1998 in an effort to let the anti-inflammatory medicine to take good effect. CX7, pp. 37 and 41-42; EX15, p.130. Claimant completed an Outpatient History Form when she visited Dr. Putnam and reported no other illnesses to the tennis elbow problem. She also noted that she was taking Paxil one time per day and pain pills three to four times per day. CX7, p. 38.

Claimant testified that she was taking anti-depressants in 1998 on Dr. Schoenhals' advice because she was working a lot of hours and going to school and then she had two friends commit suicide which was very stressful to her. TR, p. 105. Claimant also testified that she left work at Dillard's in June or July 1998 because she could not physically handle it. TR, pp. 107-108.

From May 1998 through December 1999, Claimant tried acupuncture, chiropractic therapy, magnets therapy, and vitamins as she testified that the focus in terms of her feeling depressed and needing anti-depressant medication shifted in terms of what she believed was causing her problems to the conditions with which she was working under at the base. TR, pp. 105-106, and 145; CX2, p. 3. She further stated that Employer was not fixing her chair and that she was in more pain and did not know what to do. TR, p. 106. Claimant testified that Employer refused to reimburse her for medical expenses for acupuncture, chiropractic, magnets, vitamins, or psychological counseling from Mr.[2]Jerry Day. TR, p. 107. Claimant was told that her physical problems with her right arm were related to her work as a barber by Dr. Schoenhals. TR, p. 105.

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[2] Mr. Day's resume does not indicate nor was there any testimony that Mr. Day is a medical doctor or that he ever received a doctorate in psychology. Therefore he is referred to herein as "Mr." Day rather than "Dr." Day. See CX9, p. 82.

Although Employer has accepted liability for Claimant's right arm condition, it refused to pay for Claimant's chiropractic, acupuncture, and for Mr. Day's limited psychological treatment of Claimant. TR, p. 107. Claimant has paid much of her medical expenses through her own private health insurance and estimates that she is out-of-pocket in an amount exceeding $3,000.00 for co-payments and medical treatment. TR, pp. 104 and 108.

Claimant's first session with clinical psychologist Mr. Day was in July 1999 as a result of a court order requiring that Claimant submit to psychological treatment following Claimant's manifestation of anger and rage due to the suicide of a Claimant's friend for whom Claimant ws providing household care at the time of death. The court also ordered Claimant to attend anger management therapy and classes after Claimant had a conflict with the deceased's family members and/or her boyfriend. TR, pp. 31-32, and 157-158. Claimant described the event as one where she began screaming when with her boyfriend and she was the one that the police came and took her to jail. TR, p. 157. Mr. Day provided Claimant with six to seven sessions that focused on Claimant's anger problem. TR, pp. 17-18, 31 and 33. Claimant testified to her past instability in relationships with at least five marriages to different men. TR, p. 132.

On July 15, 1999, Claimant told Dr. Schoenhals that she was on 20 milligrams of Paxil at that time for "acute grief." TR, pp. 80-81; EX10, p. 92.

After six or seven sessions with Mr. Day for anger management, Mr. Day testified that in December 1999, Claimant first told him of her right upper extremities problems. At that time, Claimant also complained of depression and house clutter. TR, p.18. Mr. Day, as a clinical psychologist, could not prescribe any psychotropic medication for Claimant as she had to rely on her treating physician, internist Dr. Schoenhals, for the anti depressant medication she took since at least 1996. TR, pp. 18. Mr. Day testified that he was not aware of any of Claimant's depressive episodes prior to his diagnosis in April 2001. TR, pp. 32-33.

Mr. Day testified that six of the ten sessions he saw claimant dealt with her anger issues through December 1999. From December 1999 through the date of hearing in December 2002, Mr. Day saw Claimant two to four more times including a meeting approximately one week before the hearing on December 13, 2002. TR, pp. 35-36. In a report to a court on July 28, 1999, Mr. Day opined that Claimant had lived under continuous barrage of stressful life events over the past three years primarily due to the suicide death of a close friend and the stress associated with the family of Claimant's boyfriend. This stress to Claimant exceeded her coping abilities according to Mr. Day. TR, pp. 37-39.

On July 20, 2000, Claimant saw Dr. Schoenhals for what Claimant described as feeling "depressed." Dr. Schoenhals was Claimant's treating physician for physical problems, he being a board-certified internist but he was not a psychiatrist. TR, pp. 61-62, and 82. Dr. Schoenhals frequently prescribed psychotropic medications for his patients, however, and he testified that internal medicine doctors are trained in management of mild to moderate emotional difficulties. Thus, he stated that it was not uncommon for an internist to initiate treatment of depression with

an anti-depressant. TR, p. 87. Claimant reported at that time that she "physically feels well." TR, p. 60; EX10, p. 92. Dr. Schoenhals noted that on July 15, 1999, he saw Claimant and prescribed 20 mgs. Paxil for her due to her "acute grief."

Also as of July 20, 2000, Dr. Schoenhals notes that Claimant has recently had three close friends or relatives who have died and Claimant has become separated from her boyfriend of seven years. TR, pp. 81-83; EX10, p. 92. Claimant also describes her symptoms as feeling bland with more bad days while crying easily. TR, pp. 60-61. Claimant also told Dr. Schoenhals that she was going through one plus year of extreme stress. TR, pp. 81-82; EX10, p. 92. Claimant told Dr. Schoenhals that she was receiving counseling for this problem at the time Dr. Schoenhals prescribes Zoloft 50 mgs. for Claimant at this visit. Claimant also described being out of her diversion program for about three months at this time. CX7, p. 40. Finally, Dr. Schoenhals confirmed at hearing that at this time in July 2000, his treatment notes make no mention of any statements from Claimant attributing the stress she mentions to her job as a barber. TR, p. 83.

Dr. Schoenhals last saw Claimant as a patient on August 14, 2000. TR, pp. 83 and 89. Throughout his treatment of Claimant, he prescribed different anti-depressant medications for Claimant depending upon her medical insurance requirements. These included Paxil, Zoloft, and Cylexa. TR, pp. 88-89. Dr. Schoenhals testified that Claimant suffered no side effects from the different anti-depressant medications he prescribed. TR, p. 89. Dr. Schoenhals further stated that August 3, 2001 was his last office note indicating that his office supplied Claimant either samples or a prescription for an anti-depressant. TR, p. 92.

Claimant first filed her claim and giving notice concerning her right arm repetitive motion problems on August 15, 2000. TR, p. 146.

Davis-Montham Air Force Base ("Employer") gave notice to Claimant on August 25, 2000 that her position as a barber was being outsourced to independent contractors as had all of the barber positions at the base. EX8, p. 69. Claimant stopped working as a barber at the base in September 2000 when it closed and all barber positions went up for bid as to who would run it in the future. TR, pp. 110, 113-114, and 133.

On October 18, 2000, Claimant alleges her temporary total disability commenced. ALJX10, p. 9; EX1, p. 7.

On September 18, 2000, Claimant was seen by Robert P. Goldfarb, M.D., a neurosurgeon, for a neurosurgical evaluation. Claimant stated that she had a three-year history of pain in the right trapezius area, right elbow and numbness in her right hand. Claimant told Dr. Goldfarb that her symptoms started when she first started working as a barber at Davis-Montham Air Force base in mid- 1997 and that she has had chiropractic treatment and acupuncture without improvement. She later says that she has not had the same or similar symptoms to those she reported that day any time before "MID-1998." She also told Dr. Goldfarb that sometime in May 1998, a co-worker opened a metal door at work and hit her right elbow and since then she has

had additional problems. She reported sharp pains in her neck and right elbow, that she has stopped doing many things, and that her workday had been reduced to four to five hours per day because of her discomfort. Claimant stated that she had no other past or present illnesses and did not check off that she has had any problems with mental illness. She did report that she was taking 20 mgs. of Celeraprom once a day. CX6, pp. 18-21.

Dr. Goldfarb's neurological examination revealed possible carpal tunnel syndrome right, right elbow pain, and right trapezius pain. Dr. Goldfarb recommended obtaining a nerve conduction velocities of the median nerve to see whether there was any entrapment and obtaining an x-ray of the right elbow because of her pain. CX7, p. 49-50.

On September 20, 2000, an electrodiagnostic nerve conduction test ("EMG") of Claimant's wrists and forearms were interpreted by Dr. Harvey G. Goodman with: (1) moderate to severe right median entrapment at the wrist; (2) mild left median entrapment at wrist; (3) normal radial and ulnar motor and sensory studies at wrists and proximal forearms; and (4) normal needle EMG both hands and forearms. CX6, pp. 23-28.

On October 4, 2000, Dr. Schoenhals' office gave Claimant a prescription for anti-depressant Zoloft. TR, p. 93.

On October 18, 2000, Dr. Thomas E. Butler, and orthopedic surgeon, examined and evaluated Claimant. He noted pain and numbness in both hands often radiating proximally. Strength difficulties were also noted. Claimant told Dr. Butler that she had experienced these problems with her hands, wrists and right elbow since March of 1998 with multiple treatments attempted. On physical examination, Claimant was very tender at the right elbow and exquisitely tender at the lateral epicondyle and had pain with resisted wrist extension. The provocative test for carpal tunnel syndrome was positive with a positive Tinel's at the distal wrist crease. The Phalen's test was also positive, as was the carpel compression test. Subjective sensation was six millimeters out into the median nerve distribution. Other than her physical problems with her right wrist and elbow, Claimant told Dr. Butler that she is otherwise fairly healthy. Dr. Butler's impression was right carpal tunnel syndrome and right tennis elbow. He indicated that surgery would be scheduled. CX7, p. 57.

Claimant subsequently had a right lateral condylectomy and carpel tunnel release on November 9, 2000, having left her job with Employer in September 2000. CX7, p. 52; EX8, p. 69. Claimant did not receive any disability co-payments from Employer, however, until February 6, 2001 and was paid at a disputed compensation rate of $166.24, utilizing the same average weekly wage. TR, p. 110; EX1, p. 7. Claimant disputes this average weekly wage and was told that despite the fact that she had sent to Employer a copy of her pay stubs with Dillard's, Employer would not recognize the Dillard's employment of Claimant. TR, pp. 111-112. On November 9, 2000, Dr. Butler performed a right carpal tunnel release and a right lateral condylectomy at El Dorado Hospital under block anesthetic. CX7, pp. 52-53.

After Claimant's surgery, Employer requested that Claimant return to the base for work. TR, p. 112. Claimant did not return to the base for any work. Id.

On December 22, 2000, Dr. Schoenhals' office gave Claimant some samples of anti-depressant Cylexa. TR, p. 93.

On January 19, 2001, Dr. Butler sees Claimant again and notes that she is generally having a little less pain with most of it related to the tennis elbow. He considers re-studying Claimant's nerves with Dr. Goodman. CX7, p. 59. In addition, Dr. Butler does not think that he can yet determine the estimated date for Claimant to have reached maximum medical improvement ("MMI"). CX7, p. 63.

On January 26, 2001, Dr. Schoenhals' office gave Claimant some more samples of Cylexa. TR, p. 93.

Claimant testified that she started receiving disability payments from Employer in January or February 2001. TR, p. 110. Employer did not pay her claim based on her work at Dillard's. TR, pp. 111-112. Claimant stopped receiving disability payments from Employer after January 8, 2002. TR, p. 148; ALJX3, p.2. Claimant first testified that she stopped receiving temporary total disability payments on January 8, 2001 despite her earlier testimony that payments did not commence until January or February 2001. See TR, pp. 110 and 118. When Claimant stopped receiving disability payments, she stopped paying for medical insurance and it lapsed. TR, pp. 115-116.

In a February 12, 2001 letter "To Whom It May Concern", Dr. Butler opines that Claimant has reached maximum medical improvement ("MMI") as to her carpal tunnel release as of that date. Dr. Butler also opines that Claimant is not yet at MMI as it relates to her elbow surgery. He states that he does not expect MMI for Claimant's elbow before six to twelve months from surgery and that he will update this information when he feels that Claimant has reached MMI for her elbow. CX7, p. 60.

Also in March 2001, Dr. Schoenhals had a telephone conversation with Claimant who reported that she was seeing a counselor, Mr. Day, and that he was treating her for anxiety and depression. TR, p. 94.

In a March 12, 2001 U.S. Department of Labor Work Restriction Evaluation, Form OWCP-5, Dr. Butler opines that Claimant currently remains off work until next re-evaluation on March 30, 2001 but he indicates that Claimant's interpersonal relations are not effected because of any neuropsychiatric condition. CX7, p. 62 . Dr. Butler references restrictions primarily with regard to Claimant's left upper extremities as he advises no lifting at that time. *Id.* Dr. Butler also completed a Long Term Disability Report at the same time and indicated that he has referred Claimant to a neurologist for restudy of her nerves due to persistent pain in her left elbow. CX7, p. 63.

No MMI yet as to Claimant's right elbow as of March 30, 2001 as per Dr. Butler. CX7, p. 65.

On July 16, 2001, Dr. Butler examines Claimant and notes that she continues to have severe problems with her right elbow. Claimant apparently tried to give one haircut and was unable to do more than one. Dr. Butler opined that Claimant was one of the thirty percent of patients that fail lateral epicondylectomy surgery. He felt that continued treatment would be conservative in nature and that Claimant would not be able to return to her previous employment as a barber. CX7, p. 67; EX15, p. 132.

Sometime in July 2001, Mr. Day sees Claimant for her depression, the first time Mr. Day has seen Claimant since December 1999. TR, p.18. Mr. Day testified that he noted a dramatic change in Claimant's psychological condition from December 1999. He stated that in his opinion, Claimant was no longer suffering under an adjustment disorder but at that time had major depression and was dysfunctional in Claimant's personal life. TR, p. 19. He further found that Claimant was unable to support herself and had been homeless many times. He believed that Claimant could not re-stabilize or perform her housework. He also testified that Claimant believed that it was improbable that she could support herself and felt depressed. TR, p. 20. Mr. Day opined at hearing that there is a direct causal relationship of depression with Claimant's inability to perform life's work and the depression and worry from that. Id. Mr. Day saw Claimant twice in July 2001 when her lack of finances prevented additional sessions. TR, p. 21. Mr. Day referred Claimant to Dr. Schoenhals for anti-depressant medication. Mr. Day testified that Claimant was unable to see a medical doctor for her anti-depression medication and gave no reason for her failure to follow up with psychotropic medication. TR, pp.21-22. Claimant did obtain a prescription on August 3, 2001 according to Dr. Schoenhals. TR, p. 92. Mr. Day opined that the combination of psychotropic medication and therapy would have been most helpful to Claimant at that time. TR, p.22 .

Dr. Butler completes a work restriction evaluation, Form OWCP-5, for Claimant stating that Claimant can work eight hours a day but that she has not reached MMI yet, but that MMI is expected 6 to 12 months after Claimant's November 9, 2000 surgery. Dr. Butler believed that Claimant needed vocational rehabilitation services. CX7, p. 72. Dr. Butler believes that Claimant is an excellent candidate for vocational retraining and he encouraged her to pursue this. He believed that Claimant was capable of performing sedentary or very light work with her upper extremities and that she should do no repetitive pushing, pulling, or wrist extension of either arm. CX7, p. 67.

On August 3, 2001, Dr. Schoenhals prescribed Paxil for Claimant one last time before requiring her to make an appointment to receive further prescriptions. TR, pp. 93-94.

On September 12, 2001, Dr. Harvey Goodman performs a third EMG nerve conduction test on Claimant's wrists and arms and interprets it as normal right median, motor, and sensory latencies at the wrist. Normal radial and ulnar conductions bilaterally, and normal needle EMG

right and left arm dorsal forearm muscles. Mild left median entrapment at wrist, unchanged since 3/08/01 test. CX6, p. 29.

On September 12, 2001, Dr Butler examines Claimant and opines that most of Claimant's pain is related to her tennis elbow. He believes that the carpal tunnel has improved and finds that there is no evidence of radial neuropathy. He reviewed treatment options with Claimant and opined that further surgery is not generally helpful for Claimant's tennis elbow condition. He believed Claimant could consider prolotherapy which involves injecting dextrose or a similar caustic agent in Claimant's right elbow to see if scar tissue can be created which would allow the area to completely heal. Dr. Butler opined that this is effective in less than 50% of patients. He recommended continued light therapy for Claimant. CX7, p. 79.

Over a two-day period of September 11 and 12, 2001, John D. Hayden, Jr., M.D., a qualified independent medical examiner with a specialty in hand and upper extremity surgery, performed an employer medical examination ("EME") as to Claimant's physical complaints. See EX16, pp. 141-143. In addition to his exam of Claimant, Dr. Hayden also reviewed Claimant's medical history. He concluded that Claimant was status post lateral epicondylectomy and right carpal tunnel release both of November 9, 2000. He opined that the Claimant continued to be symptomatic as to the right lateral epicondylitis but asymptomatic as to the right carpal tunnel syndrome. Dr. Hayden further opined that Claimant had a mild left median slowing at the wrist. Dr. Hayden also stated to a reasonable degree of medical certainty that both physical conditions related to Claimant's work as a barber and that Claimant was medically stable and stationary and was not in need of any active medical care or physical therapy for conditions related to her April 29, 1998 industrial injury. Moreover, Dr. Hayden believed that Claimant sustained neither a right hand impairment related to her right carpal tunnel syndrome nor a right upper extremity impairment related to her right lateral epicondylitis according to the American Medical Association Guides to the Evaluation of Permanent Impairment; yet he did advise that he believed that Claimant should receive a supportive care award of two physician visits per year for one year. Finally, Dr. Hayden opined that he believed that Claimant was incapable of returning to work as a barber but, instead, that Claimant was capable of performing light duty work eight hours per day. He further restricted Claimant to lifting no more than ten pounds frequently and twenty pounds occasionally with limited forceful repetitious grasping. EX15, pp. 129-138; EX16, pp. 141-143.

On October 5, 2001 Employer retained the services of Bauer Investigation to set up a surveillance of Claimant. EX17, p. 145. On Saturday, October 6, 2001, a two-man surveillance was conducted showing that Claimant left her residence and drove her manual transmission Jeep Cherokee vehicle at very high speeds and seemed to perform evasive moves, such as turning right from left-hand turn lanes, making U-turns, etc. Claimant was observed going in and out of numerous stores and the post office while in Tucson and pumping gas into her vehicle with her right hand and arm. Claimant wore what appeared to be an elastic sleeve on her right elbow. Claimant opened vehicle doors with her right hand and loaded purchases into her Jeep using both hands. EX17, pp. 145-146. Bauer also provided a videotape which showed the same events

described in its report. EX18. Claimant testified that when she drove her Jeep, a lot of times she shifted gears with her left hand and that when she had her brace on, she shifted with her right arm. TR, p. 159.

By October 16, 2001, Dr. Butler had received a copy of Dr. Hayden's EME report and Dr. Butler told Employer that he concurred with Dr. Hayden's report. EX20, pp.158-159.

On December 24, 2001, Dr. Butler examines Claimant and finds her still having problems and pain with her right elbow. She is diagnosed as having failed tennis elbow surgery. Dr. Butler continues to recommend against further surgery and recommends nonsurgical treatments. He recommended that Claimant see Dr. Debra Walter for possible prolotherapy, acupuncture, etc. CX7, p. 80.

Sometime in 2001, Claimant was involved in an automobile accident in Tucson where she smashed the front end of her Jeep but was not hurt. TR, pp. 153-154. Claimant was also in a car accident in 1999 or 2000 but there was not much damage to her car and no injuries. TR, pp. 154-155.

On April 10, 2002, Mr. Day sent a letter to Claimant's lawyer, Mr. Gronau, stating that claimant had asked Mr. Day to write the letter regarding the nature of Mr. Day's counseling session with Claimant. The letter states that in July of 2001, Claimant requested counseling regarding her depressed moods and that she terminated sessions because of an inability to pay the counseling fees. Mr. Day further provided a diagnosis with no objective evidence to support the diagnosis. He merely states that Claimant's diagnosis was 296.33, Major Depression, DSM IV and that it is a severe depression diagnosis which reflects Claimant's inability to function adequately in society and the work field. In the same conclusory manner, Mr. Day further states that the cause of Claimant's depression was from a work related injury and an inability to continue with work with no supporting detail. Mr. Day concludes his letter by stating that Claimant's "financial situation was desperate and the pressures of dealing with the requirements of getting through the disability obstacles was [were] overwhelming." CX5, p. 18.

Mr. Day testified that in his opinion, Claimant's problems with depression did not manifest until December 1999 at the earliest. TR, pp. 27, 28, 47, and 48. Mr. Day was unaware of any psychological problems that Claimant had experienced prior to 1999 other than anger problems in July 1999. *Id.* Mr. Day also testified that in his opinion, Claimant's global assessment of functioning scale ("GAF") scores were a 40 in July 1999, a 70 in December 1999, and 55 on December 13, 2002, a week before hearing. TR, pp. 51-52.

Less than a week before hearing, on December 13, 2002, Mr. Day once again saw Claimant for the first time since July 2001. At that time, Mr. Day reported that Claimant talked about feelings of malaise, sleep distress, loss of energy, confusion, inability to focus her mind and, while not being suicidal, Claimant told Mr. Day that she would not care if a truck ran over her. Mr. Day testified that he administered several psychological tests for Claimant including the SCL-

90, the Spielburg Test of Anxiety, the Iowa Personality Assessment Test, the Basic Personality Inventory, and the MCMI-III test. TR, pp. 25-26.

Mr. Day went on to testify that Claimant had no depression in 1999, that she was not treated for depression in 1999 and that there was no indication of depression at that time. TR, p. 27. Mr. Day goes on to opine that the first sign of Claimant's depression was in December 1999 and he did not treat it as he believed it not to be severe at that time. Id. Mr. Day believed that depression began to be a factor in Claimant's life in December of 1999. TR, p. 28. Mr. Day opined that until Claimant's depression is treated, she is unable to carry out duties in any work situation where she must be on time, follow directions, plan ahead, take criticism or critical instructions where her faults are pointed out. He concludes by stating that he did not think Claimant was employable without some relief from her depression and that she needs about six months of weekly treatment to change her depressive condition. TR, p. 30.

Mr. Day testified that Claimant's test results indicated that "only 7 out of 10 people that ever take this [anxiety] test will ever score higher than she scores." TR, p. 25. Other test results, according to Mr. Day, indicated that Claimant had major depression and dysthymia and was open and honest in the testing. TR, pp. 25-26. Mr. Day concluded by opining that Claimant's subjective complaints and the test results supported his diagnosis for Claimant as suffering from major depression, severe as of December 13, 2002. TR, pp. 26 and 48. Finally, Mr. Day opined that because of the upcoming December hearing in this case, among other things, Claimant was in a worse psychological condition in December 2002 than she was in July 2001. TR, p. 48.

Mr. Day produced no treatment notes or medical records from sessions with Claimant other than the conclusory April 10, 2002 letter referenced above.

Claimant testified that she occasionally drives her manual transmission Jeep for errands to stores and the post office. TR, pp.150 and 159. She also testified that she shifts gears with her left hand. TR, p. 159. She further stated that she has good days and bad days with respect to grasping with her right hand. TR, p. 121.

Vocational Evidence

Employer's witness, Amy Wise, a Vocational Rehabilitation Case Manager, testified that she has performed services about ninety-nine percent of the time exclusively for employers. TR, p. 184. Ms Wise also testified that in arriving at her opinions in this case, she relied upon reports generated by Drs. Butler and Hayden as to their recommended restrictions for Claimant. TR, p. 167. In addition, Ms Wise stated that in the course of her work in this case, she contacted Claimant as to her prior employment history, among other things, and spoke with her for over 2 and one-third hours. TR, pp. 166-169. Ms. Wise prepared a transferable skills analysis based on her conversation with Claimant. TR, p. 169. Finally, Ms Wise traveled to Tucson and attempted to meet with Claimant and did on-site market surveys over two days with several employers. Id.

Ms. Wise further opined that Claimant has wage-earning capacity in five of seven positions referenced in her Labor Market Survey and Job Analysis. TR, pp. 169-181. Each position was located in the Tucson area and were open at the time of Ms. Wise's inquiry in December 2001. TR, pp. 169 and 177. Ms. Wise opined that Claimant was capable of working various jobs including that of a customer service specialist at a rate of pay of $7 per hour plus bonus (EX25, p. 192), appointment setter/clerk at $8 per hour plus bonus (EX25, p. 194), leasing agent at a rate of pay of $8-$9 per hour plus bonus (EX25, p. 193), phone reservationist at $5.75-$6 per hour (EX25, p. 196), and optical retail sales clerk at $6.25 per hour plus commission (EX25, p. 195). TR pp. 173-181. Ms. Wise found that her analysis is consistent with the various evaluations of Claimant that she reviewed in that the customer service specialist, appointment setter/clerk, and optical retail sales clerk positions are within the physical restrictions that both Claimant's treating physician, Dr. Butler, and the employer's medical evaluator, Dr. Hayden, recommended for Claimant with each doctor's restrictions taken into consideration. TR pp.172, 175, 176, 176, and 177. Dr. Butler and Ms. Wise also opined that the phone reservationist position was acceptable for Claimant given the medical restrictions from Dr. Butler. TR, pp. 177-178; see also EX22-25, and 28, pp. 162-203, 221-226.

With respect to Claimant's alleged psychological limitations, Ms. Wise testified that she did not take into consideration Claimant's mental condition with respect to the restrictions involved. TR, p. 182. Ms. Wise did testify that in her opinion and prior experience, Claimant's anti-depressant medications such as Prozac and Paxil would not interfere or make someone sleepy in the course of a working shift. TR, pp. 183-184. In fact, Dr. Schoenhals also testified that Claimant suffered no side effects from any of her anti-depressant medications. TR, p. 89. As a result, I find that Claimant's mental condition and the medications taken for treatment do not effect Claimant's ability to perform the duties required in any of the above-mentioned positions.

Ms. Wise concluded by finding that employers had positions open on September 11, 2001, Claimant's permanent and stationery date. Two of six companies had positions available during this period with wages ranging from $7.00 to $8.00 per hour. EX28, p. 223. With respect to Claimant's date of injury, Ms Wise found that as of her April 29, 1998 date of injury, wages ranged from $4.73 to $7.41 per hour in regard to the six jobs found appropriate. *Id*.

CONCLUSIONS OF LAW

I. ***Credibility***

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968); *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 165, 167 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). In addition, an ALJ is the factfinder and "is entitled to consider all credibility inferences. He can accept any part of an

expert's testimony; he may reject it completely." *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88,91 (5th Cir. 1988)

Mr. Day was not credible when he stated that in his opinion, Claimant was no longer suffering under an adjustment disorder but that in July 2001 Claimant had major depression and was dysfunctional in Claimant's personal life. TR, p. 19. This is inconsistent with his later statement, without any treatment notes or documentary evidence, that Claimant was in a worse psychological condition in December 2002 with a global assessment functioning score ("GAF") of 55 than in July 2001 thereby meaning that Claimant's GAF score had to be greater than the moderate score of 55. Mr. Day's conclusory diagnosis of major depression for Claimant in July 2001 is also inconsistent with Claimant's treating physician Dr. Schoenhals' continuous treatment notes for this time period which indicate no change in Claimant's relatively low dosage (20mg) of psychotropic medication from 1996 through 2001. TR, p. 80-81; CX7, pp. 36, 39-40, 43-45, and 81; EX10, p. 92. Dr. Schoenhals testified that he is trained in management of mild to moderate emotional difficulties. TR, p. 87.

In addition, Mr. Day was not aware of Claimant's prior history of depression prior to December 1999 as Claimant testified that she suffered depression as a teenager and young adult and had taken anti-depressant medication prescribed for her at least since 1996. TR, pp. 32-33. Claimant's treatment notes from Dr. Schoenhals' office also reference "child depression" for Claimant. EX10, p. 85. Mr. Day's testimony that Claimant first developed depression in December 1999 is not believable nor supported by the evidence. Mr. Day was not credible in his failure to attribute Claimant's psychological problems to her pre-existing anger problem which resulted in a court-ordered anger management program and her history of unstable relationships resulting in at least five different marriages and divorces. TR, pp. 132 and 157. Mr. Day's lack of treatment notes or supporting objective evidence for his testimony and his demeanor at hearing also contribute on the whole to make his credibility and opinions highly suspect.

Mr. Day was also not credible when he indicated that Claimant could not get to a physician for her anti-depressant medication and did not follow up two single sessions counseling with Mr. Day in July 2001 when, in fact, there was testimony that Dr, Schoenhals prescribed anti-depressant medication, five refills to Claimant on August 3, 2001. TR, p. 93.

Claimant was not credible in her statements that she had limited use of her right hand and elbow to support total disability when the surveillance investigation showed that on October 6, 2001, Claimant drove her manual transmission Jeep Cherokee vehicle at very high speeds and seemed to perform evasive moves, such as turning right from left-hand turn lanes, making U-turns, etc. Claimant was observed going in and out of numerous stores and the post office while in Tucson and pumping gas into her vehicle with her right hand and arm. Claimant wore what appeared to be an elastic sleeve on her right elbow. Claimant opened vehicle doors with her right hand and loaded purchases into her Jeep using both hands. EX17, pp. 145-146. Bauer also provided a videotape which showed the same events described in its report. EX18. Claimant was also not credible when she testified that she shifted her Jeep's manual transmission with her right hand only when she wore her brace. The surveillance video shows Claimant wearing a right

elbow sleeve, not brace. Claimant simply was not believable when she testified that sometimes she shifts gears in her Jeep with her left hand.

Claimant was not credible when she testified that her right upper extremities problems started on April 29, 1998 yet she told Dr. Goldfarb on September 18, 2000 that her problems started in mid-1997. CX6, p. 19. Claimant was also not forthcoming to Dr. Putman with respect to her pre-existing depression problem when she completed an Outpatient History Form and reported no other illnesses to the tennis elbow problem in April 1998. She did note, however, that she was taking Paxil one time per day and pain pills three to four times per day. CX7, p. 38.

Claimant also lacks credibility for waiting until August 2000 to file her claim with respect to her April 28, 1998 injury. TR, p. 146. Only a month earlier on July 20, 2000, Claimant reported that she "physically feels fine" to her treating physician. TR, p. 60; EX10, p.92. Claimant also reported to Dr. Schoenhals at this time, however, that she was feeling "depressed" having gone through one plus year of extreme stress having lost three close friends or relatives to death and being separated from her boyfriend of seven years. TR, pp. 81-83; EX 10, p. 92. Claimant's physically feeling fine while suffering stress and depression is inconsistent with Mr. Day's conclusory July 2001 diagnosis of major depression due to Claimant's work-related physical problems. CX5, p. 18. Moreover, in September 2000, Claimant did not check-off that she had any problems with mental illness in a filled-out form to Dr. Goldfarb. CX6, p. 21. Finally, in October 2000, Claimant told her orthopedic sturgeon, Dr. Butler, that other than her physical problems with her right wrist and elbow, she was otherwise healthy. CX7, p. 57.

II. ***Causation***

The parties stipulated that Claimant's physical injuries to her right wrist and elbow are compensable claims related to Claimant's work as a barber for Employer. TR, pp. 9-11. The only issue is Claimant's allegation that her pre-existing psychological condition was aggravated due to working conditions at Employer's barbershop. *Id*.

A. Claimant's Prima Facie Case For Aggravation of Her Psychological Condition

Claimant contends that the impairment related to alleged psychological condition was in fact caused, accelerated, or aggravated by cumulative trauma she incurred while performing her job as a barber. Employer contends that there is an inadequate factual basis for concluding that Claimant's work duties had any sort of causal relationship for accelerating or aggravating her pre-existing psychological impairment.

Insofar as the Claimant contends that she suffered a work-related psychological injury, she is aided by the provisions of subsection 20(a) of the Longshore Act, which provides that in proceedings to enforce a claim under the Act, "it shall be presumed, in the absence of substantial evidence to the contrary — (a) that the claim comes within the provisions of the Act ...." In order to invoke this presumption, a Claimant must produce evidence indicating that he or she suffered

some harm or pain and that working conditions existed or an accident occurred that could have caused the harm or pain. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Thus, the presumption cannot be invoked if a claimant shows only that he or she suffers some type of impairment. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608 (1982). However, a claimant is entitled to invoke the presumption if he or she adduces at least "some evidence tending to establish" both prerequisites and is not required to prove such prerequisites by a preponderance of the evidence. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C.Cir. 1990)(emphasis in original). Moreover, an injury need not be traceable to a definite time, but can occur gradually, over a period of time. *See Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986).

In this case, Claimant alleges that the work-related injuries to her right wrist and elbow aggravated her pre-existing psychological condition. Claimant has submitted some evidence in the form of Dr. Schoenhals' treatment notes and his testimony that while Claimant worked at Employer, he treated her for her depression. TR, pp. 55-95; CX7, pp. 36, 39-40; EX10, p. 77, 83, 85-87, 89, 92, and 93. In addition, while Dr. Schoenhals did not increase the level of Claimant's psychotropic medication, there is additional evidence that Claimant experienced "acute grief" and was jailed in 1999 for her anger outburst with her boyfriend at the time she worked for Employer. TR, p. 80-81, 156-158. Claimant testified that her physical injuries and missed work contributed to her financial problems thereby increasing her level of depression. TR, p. 113. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

B. Employer Has Rebutted the Section 20(a) Presumption With Substantial Evidence

Once a claimant establishes that she has sustained harm, and that the accident occurred or working conditions existed which could have caused it, she has established a **prima facie** case for a work-related injury. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Thus, once the subsection 20(a) presumption has been properly invoked, the relevant employer is given the burden of presenting substantial evidence to counter the presumed relationship between the Claimant's impairment and its alleged cause. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). "[T]he evidentiary standard for rebutting the § 20(a) presumption is the minimal requirement that an employer submit only 'substantial evidence to the contrary.'" *Conoco v. Director, OWCP*, 194 F.3d 684, 690 (5th Cir. 1999).

Employer refuses to attribute to Claimant any work-related acceleration or aggravation of Claimant's pre-existing psychological condition submitting evidence which, instead, contradicts Claimant's argument. Employer submits evidence which either shows no change in Claimant's psychological condition including evidence that Claimant's psychotropic medication dosage remained unchanged before, during, and after Claimant's work as a barber as well as evidence that Claimant's daily tasks showed no psychological impairment in October 2001. TR, pp. 55-95; CX7, pp. 36, 39-40; EX10, p. 77, 83, 85-87, 89, 92, and 93; EX18-19. Alternatively, Employer submitted more than a modicum of evidence that even if Claimant's psychological condition worsened while she suffered work-related physical injuries, the worsened psychological condition

was caused by factors unrelated to Claimant's employment including her acute grief from the deaths of friends, lack of continued treatment, or separation from her boyfriend, and related family problems. TR, pp. 31-55, 68-86, 92-96, 131-161; EX10, pp77, 83, 85-87, 89, 92, and 93. Consequently, I find that Employer has adequately rebutted the § 20(a) presumption and has countered the presumed relationship between the Claimant's psychological impairment and its alleged cause.

C. The Weight of the Evidence Shows That Claimant's Physical Injuries Are Compensable As Work-Related But Not Claimant's Alleged Psychological Condition

Once an employer successfully rebuts a § 20(a) presumption by producing "substantial evidence" – more than a modicum but less than a preponderance – that the injury was not work-related, the ALJ must assess the issue of causation by looking at all record evidence. *Gooden v. Director, OWCP,* 135 F.3rd 1066, 1068 (5th Cir. 1998). Stated differently, if the presumption is rebutted, it falls out of the case and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). Under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), the ultimate burden of proof then rests on the claimant. *See also Holmes v. Universal Maritime Services Corp*., 29 BRBS 18, 21 (1995). However, the subsection 20(a) presumption does not assist claimants in proving that any disability resulting from a work injury was in fact permanent. *Holten v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp*., 12 BRBS 112 (1979). A work-related aggravation of a prior injury is considered to be a new injury under the Act, and is compensable based on Claimant's average weekly wage at the time of the aggravating event. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984); *see also Merrill v. Todd Pacific Shipyards Corp*., 25 BRBS 140 (1991).

In considering medical evidence concerning a worker's injury, a treating physician's opinion is entitled to "special weight." *Amos v. Director, OWCP, 153 F.3d 1051* (9thCir. 1998). In fact, in the Ninth Circuit, clear and convincing reasons must be given for rejecting an *uncontroverted* opinion of a treating physician. *Magalanes v. Bowen*, 881 F.2d 747, 751 (9thCir. 1989). However, the Ninth Circuit has also held that a treating physician's opinion is not necessarily conclusive and may in some circumstances be disregarded, even if uncontradicted. For example, an administrative law judge may reject a treating physician's opinion that is "brief and conclusory in form with little in the way of clinical findings to support [its] conclusion." *Id.* In addition, an administrative law judge can reject the opinion of a treating physician which conflicts with the opinion of an examining physician, if the ALJ's decision sets forth "'specific, legitimate reasons for doing so that are based on substantial evidence in the record.'" *Id.*

Claimant's right wrist and elbow problems came about as a result of her work as a barber for Employer in April 1998. I find that there is substantial medical record evidence in support of the parties' stipulation that Claimant's physical injuries are compensable under the Act. See CX6 and CX7, and EX15.

Claimant also alleges a psychological condition involving major depression and anxiety that she believes is work-related and, therefore, compensable under the Act. Clinical psychologist Mr. Day's and Claimant's combined lack of credibility, however, is relevant because in diagnosing Claimant's psychiatric condition, Mr. Day relied on what Claimant told them. I find that Claimant was not prevented from returning to her former longshore employment by any psychiatric condition. In making this determination, I rely on the record which shows Claimant conducting daily activities such as running several errands and encountering the general public without any hesitation or observed psychological impairment whatsoever. EX18 and 19. This is inconsistent with Claimant's statements made to her doctors which assumingly formed the basis for a diagnosis of major depression. See TR, pp 14-55. I reject all evidence and testimony from Mr. Day for the reasons stated earlier that he lacked credibility.

Based on Claimant's lack of credibility as explained above, I find that she is not a trustworthy witness. I reject CX5, p.18, the 2002 conclusory psychiatric letter from Mr. Day, and accept the treatment notes of treating physician Dr. Schoenhals which provide reference to Claimant's mild dosage psychotropic medication which remained unchanged from 1996 through 2002. TR, pp. 31-55, 68-86, 92-96, 131-161; EX10, pp77,83,85-87,89,92, and 93. As a result, Claimant failed to present credible evidence that her pre-existing psychological condition became aggravated as a result of her work-related physical injuries and did not establish any continuing inability to return to work due to any psychiatric condition. Alternatively, even if a psychiatric condition existed, it was related to Claimant's admitted "acute grief" from the deaths of her friends, her continued unstable relationships and other family problems rather than her employment or physical injuries related to her employment. See TR, pp. 31-55, 68-86, 92-96, 131-161; EX10, pp77, 83, 85-87, 89, 92, and 93.

III. ***Average Weekly Wage***

Employer contends that Claimant's average weekly wage ("AWW") at the time of her industrial injury was $171.60, which is Claimant's alleged annual earnings from her work as a barber not including undeclared tips or her work at Dillard's during the 52-week period leading up to her industrial injury if the date disability commenced was April 29, 1998, divided by 52, per Section 10(c). ALJX3, p.2. Claimant argues that her pre-accident weekly earnings are $302.87 calculated using Section 10(c), assuming April 29, 1998 as the date disability commenced, during the 52-week period leading up to her industrial injury if the date disability commenced was April 29, 1998, divided by 52. ALJX2, p. 2.

A. Application of Section 10:

Section 10 of the Act sets forth three methods, in subsections 10(a), (b) and (c), for determining a Claimant's average annual earnings; that figure is then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910. The computation methods establish a Claimant's earning power at the time of injury. See *Johnson v. Newport News*

Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990); *Orkney v. General Dynamics Corp*., 8 BRBS 543 (1978).

The calculation methods of Sections 10(a) and 10(b) are applicable where an injured employee's work is regular and continuous. Section 10(a) applies if the employee "worked in the employment ... whether for the same or another employer, during substantially the whole of the year immediately proceeding" the injury. 33 U.S.C. § 910(a); *See Empire United Stevedores v. Gatlin*, 936 F.2d 819 (5th Cir. 1991); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133 (1990). Section 10(a) looks to the actual wages of the injured worker. See 33 U.S.C. § 910(a).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year," prior to his injury. Section 10(b) looks to the wages of other workers in the same employment situation and directs that the average weekly wage should be based on the wages of the employee of the same class, who worked substantially the whole year preceding the injury, in the same or similar employment, in the same or neighboring place. See 33 U.S.C. § 910(b).

Section 10(c) should be applied in cases where the methods used in subsections (a) and (b) cannot reasonably and fairly be applied. See 33 U.S.C. § 910(c); *See Newby v. Newport News Shipbuilding & Drydock Co.*, 20 BRBS 155 (1988). The object of Section 10(c) is to arrive at a sum which reasonably represents the Claimant's annual earning capacity at the time of the injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819 (5th Cir. 1991); Richardson v. Safeway Stores, Inc. 14 BRBS 855 (1982). I find that Claimant's pay-stubs from Employer and Dillard's provide substantial evidence that the stipulated § 10(c) method for calculating Claimant's AWW is a fair and reasonable approximation of Claimant's annual wage-earning capacity at the time of injury.

B. *Claimant's AWW from Her Work As a Barber with Employer*

Claimant's wage statements from Employer indicate that in the calendar year 1998, Claimant earned $9,801.52 in base salary and, in 1999, she earned $8,148.82. EX5, pp. 28 and 30. Taking the average of these two annual amounts and dividing by 52 weeks results in a base AWW for Claimant's barber work of $172.60 and amount put forth by Claimant. ALJX10, p. 12. Employer argued that Claimant's base AWW was $171.60. ALJX3, p. 2. I find that Claimant's base salary AWW is $172.60, a fair and reasonable amount under § 10(c) as supported by the evidence.

C. *Tips Are Not "Wages" for AWW Purposes*

Claimant argues that the monies she formerly received in the form of tips while working as a barber should be included as wages in calculating her disability benefits under section 902(13) of the Act. Claimant produced no documentary evidence as to the amounts of undeclared cash tips

she received and testified that she did not report her tips as income on her federal income tax returns. TR, p. 142.

This issue turns on whether the tips should have been included as "wages" for purposes of calculating benefits under the Act.

> "The term 'wages' means the money rate at which the service rendered by an employee is compensated by an employer... including the reasonable value of any advantage which is received *from the employer* and *included for purposes of any withholding of tax* under subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes." 33 U.S.C. § 902(13)(emphasis added).

In the present case, I find that Claimant failed to provide adequate documentary evidence to readily ascertain the value of tips she received from her hair-cutting clients to add to her calculation of her average weekly wage. I also find that Claimant was paid tips from the individuals receiving the haircut and *not* from Employer. As such, I find that tips were not part of the "money rate" by which Claimant was compensated under her contract for hire with Employer.

In addition, only a small percentage of the tips Claimant actually received, one dollar per day, were included in Claimant's gross income for purposes of withholding of tax. TR, p. 100-101; 141-143; EX6, pp. 1-13. I further find that Claimant could keep the tips and spend them as she chose. Consequently, I hold that these tips were an "advantage" to Claimant under section 902(13) of the Act. This "advantage," however, is not a "wage" within the meaning of § 2(13) because the tips were received *from Claimant's former clients and not from Employer. See Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 326 (4th Cir. 1998)(The second requirement of § 902(13)n is that payments to the employee are paid "by the employer.").

Finally, because Claimant did not declare the tips she received as income and did not pay taxes on these same tips to the Internal Revenue Service, she is judicially estopped from adding these tips to calculate her average weekly wage. See *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996)(Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.) "It is an equitable doctrine intended to protect the integrity of the judicial process by preventing a litigant from `playing fast and loose with the courts."' *Helfand v. Gerson*, 105 F.3d 530, 534 (9th Cir. 1997) (*quoting Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991)). Because of its purpose and equitable nature, invoking the doctrine of judicial estoppel is discretionary. *Russell*, 893 F.2d at 1037.

Claimant's reliance on *Story v. Navy Exchange Service Center & Gates McDonald & Co.*, 33 BRBS 111 (1999) is misplaced as the facts here are distinguishable from those in *Story*. Unlike the facts in *Story*, here the gratuities that Claimant received were not contemplated as part of the "money rate" at which she was to be compensated by Employer under the contract for hire. In fact, Claimant testified that when she was hired, she understood Employer's policy to be that tips were not allowed. TR, p. 100. In addition, the claimant in *Story* was able to document the

amount of tips she received with records she kept. Here there was no documentary evidence to support Claimant's receipt of tips. Finally, this case is within the jurisdiction of the Ninth Circuit Court of Appeals and must follow its interpretation that "the term 'including' contained in Section [90]2(13) as 'or' thereby interpreting the phrase 'including the reasonable value of any advantage' as a mandatory limitation on the inclusion of non-monetary compensation in the definition of wages." *Story, supra*, 33 BRBS at 115 citing to *Wausau Ins. Cos.v. Director, OWCP*, 114 F.3d 120 (9th Cir. 1997) and *McNutt v. Benefits Review Board*, 140 F.3d 1247 (9th Cir. 1998). *See also H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 478-79 (5th Cir. 2000)(Following *McNutt*). The Benefits Review Board in *Story* rejected the Ninth Circuit cases and chose to follow cases with contrasting interpretations of Section 902(13).

D. *Claimant's Earnings from Her Work at Dillard's Should Be Included In Calculating AWW*

Without citing any legal authorities, Employer argues that Claimant's earnings from her work at Dillard's should not be used together with her earnings from Employer to calculate her AWW under section 910(c) despite Claimant's submittals of pay-stubs from her Dillard's work in 1997 and 1998. See CX4, pp. 15-17. Claimant disagrees and requests that her Dillard's earnings be added to her earnings from Employer to calculate AWW. Claimant is correct as her earnings from Dillard's should be used to calculate AWW under § 10(c). *See Price v. Director, OWCP*, No. 89-7030 (9th Cir. 1990 (unpublished)(Ninth Circuit holds that claimant's AWW calculation should include both his earnings as a commercial fisherman and longshoreman); *see also Tri-State Terminals, et. al v, Fred Jesse, et. al.*, 10 BRBD 700, 706-707 (7th Cir. 1979), *aff'g* 7 BRBS 156 (Seventh Circuit affirms Board's interpretation of § 10(c) construing annual earning capacity to mean the amount of earnings the claimant would have the potential and opportunity to earn absent injury).

Here, Claimant testified that she worked for Dillard's Department Store "never less than 20" hours per week. TR, p. 99 and 138. She earned $9.30 per hour with this work. *Id*. I find that at the time of her injury, Claimant was working an average of 20 hours per week at $9.30 per hour at Dillard's thereby entitling her to a calculation of $186.00 per week in consideration of her true average weekly wage.

As referenced above, I find that Claimant's injuries to her right upper extremities manifested as of April 29, 1998. The evidence shows that Claimant's AWW was $186.00 at Dillard's and $172.60 as a barber with Employer, (without undeclared tips) totaling $358.60.

Moreover, Claimant admitted that her Dillard's work fluctuated and declined as she switched from full time to part time in 1997. TR 136-138. She also stated that there was less work in 1998 than in 1997 as she stopped working at Dillard's in June 1998. TR, p. 138. This is plainly the kind of "intermittent and casual" employment for which § 910(c) controls calculation of the average weekly wage. *See Marshall v. Andrew F. Mahoney Co.*, 56 F.2d 74,78 (9th Cir. 1932).

Moreover, the parties stipulated that Section 910(c) is applicable and I concur. Section 910(a) is not applicable because Claimant did not work for substantially the whole year preceding the injury first manifested on April 29, 1998. Likewise, Section 910(b) is not applicable because there is no evidence in the record of wages earned by a comparable employee during the year preceding the injury. Since neither Sections 910(a) nor 910(b) applies, the average weekly wage must be calculated under Section 910(c).

Claimant also argues that since § 6(b) of the Act requires that Claimant's minimum AWW be $208.94, she is entitled to a corresponding compensation rate of $208.94 in place of her base AWW of $172.60. ALJX10, pp. 12 and 13. Claimant is mistaken for two reasons. First, she ignores the fact that her Dillard's earnings are also part of her AWW calculation thereby bringing her above the minimum AWW figure. Therefore, substituting $208.94 in place of $172.60 would be an unreasonable windfall for Claimant which is not a fair and reasonable approximation of Claimant's annual wage-earning capacity at the time of injury. In addition, the minimum benefit provision of § 6(b)(2) does not apply to cases of permanent partial disability as here. *See Steevens v. Umpqua River Navigation et. al.*, 35 BRBS 129, 134-35 (2001); *see also Smith v. Paul Bros. Oldsmobile Co.*, 16 BRBS 57(1983).

Thus, I find that Claimant's average weekly wage for her right upper extremities injuries is $358.60, that the PPD rate is $239.07, and that all accrued compensation is payable for Claimant's permanent partial disability injury, less payments made, commencing as of September 25, 2000, Claimant's last day at work with Employer. TR, p. 110; EX8, p. 69. Because Section 910(c) is meant to determine a claimant's average weekly wage at the time of her injury, I am not factoring in the subsequent outsourcing by Employer of Claimant's position as a barber. *See Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in part. part* 600 F.2d 1288 (9th Cir. 1979).

IV. ***Claimant's Request for Section 7 Medical Benefits***

Claimant alleges that she is entitled to continued medical care and services for both her psychological and right elbow condition. ALJX10, p. 8. While this is true with respect to Claimant's future medical care and services for her right arm condition commencing in October 2000, I have earlier found that Claimant's psychological condition is not work-related. Therefore, I find that none of Claimant's medical costs for care, prescriptions, services, etc. in connection with her psychological condition are reimbursable to her by Employer or owed to any third party by Employer.

In addition, I find that none of Claimant's medical expenses incurred for chiropractic, magnet therapy, or acupuncture services prior to October 1998 are reimbursable to her by Employer as there was no credible evidence provided that indicates that these services were prescribed by a treating physician. *See Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). It is the claimant's burden to establish the necessity of treatment rendered for his (or her) work-related injury. *See, generally, Schoen v. U.S. Chamber of Commerce,* 30 BRBS 112 (1996); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988); *Ballesteros v. Willamette*

Western Corp., 20 BRBS 184 (1988). Moreover, there was no itemization or documentary evidence submitted in support of these charges. Also, other than detailed mileage amounts for services provided by Dr. Butler, there is no evidence in support of Claimant's other mileage amounts for 1998 - 2001 as these seem to include mileage incurred for disallowed medical expenses referenced herein. Claimant did not satisfy her burden with respect to all medical expenses related to acupuncture, chiropractic, or magnet services. Moreover, Dr. Butler did not prescribe acupuncture for Claimant until December 2001. CX7, p. 80. Similarly, chiropractic treatment is reimbursable only to the extent it consists of manual manipulation of the spine to correct a subluxation shown by x-rays or clinical findings. *See 20 C.F.R. § 702.404.* Here, Claimant's x-rays of her right arm were normal in September 2000. CX6, p. 22.

As a result, I find that Claimant is entitled to recover reimbursement for her medical expenses incurred in connection with her right arm condition commencing as of April 29, 1998 and continuing through December 31, 2001 including her payments to Tucson Medical Center and requested mileage reimbursement for services or prescriptions incurred as of April 29, 1998 other than for her psychological condition, chiropractic, acupuncture, and magnet expenses referenced above. I further adopt Dr. Hayden's recommendation and find that Claimant is also entitled to future medical benefits consisting of a supportive care award of two physician visits per year for one year. *See EX15, p. 138.*
Specifically, I find that Claimant is entitled to reimbursement of her out-of-pocket medical expenses totaling $ 355.11 representing the total of $ 115.83 ('00 - 15 mi x 32.5 cents/mi + '01 - 321.6 mi x 34.5 cents/mi CX2, p. 4) + $ 40.43 ('98 - 9.6 mi x 32.5 cents/mi + '99 - 6.8 mi x 31 cents/mi + '00 - 3.2 x 32.5 cents/mi + '01 - 99 mi x 34.5 cents/mi. CX2, p. 5) + $ 23.23 ($9.61 x 2 braces + $4.01 sling CX2, p. 7) + $ 13.62 ($1.62 mileage + $12.00 co-pay CX2, p. 9) + $162.00 ($135.00 ($15 x 9 co-pays)) + $ 13.00 brace + $14.00 supplies CX3, pp. 14).

V. ***Section 14(e) Penalty***

Claimant argues that Employer's first payment of compensation to Claimant in response to her timely noticed physical injuries claim of August 15, 2000, was on February 6, 2001 when Employer filed its Form LS-208. TR, pp. 10 and 110; EX, pp. 1, 7, and 14. Employer paid $1,828.64 in February 2001 for 11 weeks of compensation at the rate of $166.24. EX1, p. 7. Claimant also argues that Employer has not paid for medical care or services pursuant to § 7 of the Act for her claim despite alleging timely notice and request for reimbursement of these expenses dating back to 1998. ALJX10, p. 10. Finally, Claimant argues that she was not paid compensation from Employer for her prior work at Dillard's Department Store and that Employer should be penalized for such failure to pay. ALJX10, p. 10. Consequently, Claimant seeks a penalty assessment pursuant to 33 U.S.C §914(e) [§14(e)] equal to 10% of the accrued compensation from October 18, 2000 to February 6, 2001. ALJX10, pp. 9-10. Additionally, Claimant seeks an award of interest on all accrued unpaid compensation. ALJX10, p. 13.

Employer responds by stating that Claimant did not give notice of her alleged physical injuries until her claim was received on August 25, 2000 and that Claimant never requested authorization for treatment in the years prior to her August 2000 claim. EX1, p. 4. In fact,

Employer filed its Notice of Controversion of Right to Compensation on September 25, 2000. *Id*. Moreover, Employer claims that it disputed Claimant's work at Dillard's because it contributed to her pain allegations dating back to 1998. *Id.* Finally, it was not until Claimant's job was outsourced, along with all other base barbers, that Claimant stopped working.

Section 14(e) of the Act provides:

> If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 percent thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

33 U.S.C. §914(e).

A Section 14(e) penalty, however, will not be assessed where the employer timely controverts the claim, even where the case ultimately results in an unfavorable disposition to the employer. *See Prime c. Todd Shipyards Corp.*, 12 BRBS 190 (1980). A Claimant's request for additional compensation based on a higher average weekly wage followed by the employer's refusal to pay constitutes a controversy for purposes of Section 14, and the employer must file a notice of controversion within 14 days from the date of controversy in order to avoid a Section 14(e) penalty. *See Browder v. Dillingham Ship Repair*, 25 BRBS 88 (1991).

Employer argued that since it never received notice of Claimant's physical injuries and claim for compensation benefits for any time period prior to September 25, 2000, it was not required to file a notice of controversion within 14 days from the date of controversy in order to avoid a Section 14(e) penalty. Although the plain language of § 14(b), (d), clearly states that an employer need only have notice or knowledge of an "injury" before it must pay benefits or controvert the claim, it is illogical to find that Employer had knowledge of an injury in August 2000, when the full extent of Claimant's injury was not yet known to Employer or to Claimant. In *National Steel & Shipbuilding Co. v. U.S. Dept. of Labor, OWCP*, 606 F.2d 875 (9th Cir. 1979), the Ninth Circuit explained the circumstances under which an employer must file a notice of controvertion in order to avoid liability for a penalty. The court stated:

> [T]he notice requirement is not triggered until the employer has reason to believe a controversy will arise, whether because of the employer's own actions in terminating or reducing benefits previously paid voluntarily or because of the employee's protests or claims with respect to compensation. Once the employer has reason to believe that a controversy has arisen or will arise, however, it must file the notice of controversion within 14 days or be liable for the 10 percent assessment computed on all amounts unpaid between the time notice should have been filed and the time notice is filed (or the time the

Department of Labor acquires knowledge of the facts that a proper notice would have revealed)..

Id. At 879.

While Claimant may have given notice to Employer of her physical injuries as of August 25, 2000 (EX1, pp.1 and 4), she did not offer any documentary or testimonial evidence regarding the alleged notification giving Employer any reason to believe that Claimant was alleging lost compensation benefits from April 29, 1998 to May 3, 1998 or any time prior to October 2000. EX1, p. 1. Therefore, I find that the Claimant has failed to establish that the Employer was aware of the dispute prior to its September 2000 filing of its Notice of Controversion. (EX1, p. 4). And since liability for a Section 14(e) penalty terminates on the date the employer files the Notice of Controversion or on the date of the informal conference, whichever occurs first (*See National Steel & Shipbuilding Co., supra*), Claimant is not entitled to a Section 14(e) penalty with respect to any missed work prior September 2000.

With respect to Claimant's request for a § 14(e) penalty against Employer for her unpaid medical expenses, Claimant failed to provide sufficient credible evidence that the medical expenses incurred prior to the September 25, 2000 filing of Employer's Notice of Controversion were properly authorized or that Employer had knowledge of the medical expenses from Claimant's treating physicians or physical therapists before she stopped working in September 2000.

VI. ***The Date Of Maximum Medical Improvement***.

Claimant contends that her work-related right elbow impairment has not yet reached the point of maximum medical improvement ("MMI") yet she asserts that any wage loss benefits to which she is entitled are for a permanent total rather than permanent partial disability. ALJX2 pp. 2. In contrast, Employer contends that any work injury Claimant may have suffered reached the point of maximum medical improvement on September 12, 2001. EX15, p.137; EX19, p. 155, 157; EX20, p. 159.

A disability will be considered permanent if the employee's impairment has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp*., 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). *See also Crum v. General Adjustment Bureau*, 738 F.2d 474, 480 (D.C. Cir. 1984)(physician's evaluations of Claimant indicated that his heart condition, although improved, was of indefinite duration); *Air America, Inc. v. Director, OWCP*, 587 F.2d 773, 781-782 (1st Cir. 1979); *Care v. Washington Metr. Area Transit Auth.*, 21 BRBS 248, 251 (1988).

Permanency does not, however, mean unchanging. Permanency can be found even if there is a remote or hypothetical possibility that the employee's condition may improve at some future date, *Watson*, 400 F.2d at 654; *Mills v. Marine Repair Serv.*, 21 BRBS 115, 117 (1988); *Brown*

v. Bethlehem Steel Corp., 19 BRBS 200, 204, aff'd on recon, 20 BRBS 26 (1987). Likewise, a prognosis stating that chances of improvement are remote is sufficient to support a finding that a Claimant's disability is permanent. *Walsh v. Vappi Constr. Co.*, 13 BRBS 442, 445 (1981); *Johnson v. Treyja, Inc.*, 5 BRBS 464, 468 (1977).

The question of whether a Claimant's condition has reached the point of maximum medical improvement is primarily an issue of fact and must be resolved on the basis of medical rather than economic evidence. *See Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Dixon v. John J. McMullen and Associates, Inc.*, 19 BRBS 243 (1986); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). The mere possibility that a claimant's condition may improve in the future does not by itself support a finding that a claimant has not yet reached the point of maximum medical improvement. *See Brown*, 19 BRBS at 204. However, a condition is not permanent as long as a worker is undergoing treatment that is reasonably calculated to improve the worker's condition even if the treatment may ultimately be unsuccessful. *See Abbott v. Louisiana Insurance Guaranty Ass'n*, 27 BRBS 192, 200 (1993), *aff'd sub. nom, Louisiana Insurance Guaranty Ass'n. v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994).

Where surgery is anticipated, maximum medical improvement has not yet been reached. *Kuhn v. Associated Press*, 16 BRBS 46, 48 (1983). However, if anticipated surgery is not expected to improve a Claimant's condition or if a Claimant reasonably refuses to undergo surgery, the condition may be considered permanent. *Phillips v. Marine Concrete Structures*, 21 BRBS 233 (1988); *Worthington v. Newport News Shipbuilding and Dry Dock Company*, 18 BRBS 200 (1986).

On February 12, 2001, Claimant's treating physician, surgeon Thomas E. Butler, M.D., opined that Claimant had reached MMI as it related to her right wrist carpal tunnel and release surgery and opined that Claimant had a 4% permanent impairment of the upper extremity related to general loss of grip strength. CX7, p. 60. Dr. Butler further opined that with respect to Claimant's right elbow or epicondylectomy surgery, MMI does not usually occur until six to twelve months after Claimant's November 2000 surgery. *Id.*

On or about September 12, 2001, Claimant was examined by John Hayden, M.D., an orthopedic surgeon for an independent medical examination. Dr. Hayden examined Claimant and reviewed the Claimant's medical history from April 1998 through surgery in November 2000, and her post-operation sessions until July 16, 2001. EX15, pp. 130-132. Dr. Hayden issued a report that stated he had reviewed Claimant's file and examined her. Dr. Hayden indicated that as of September 12, 2001, Claimant's right upper extremity condition was considered medically stationary/fixed and stable and not in need of any active medical care or physical therapy for conditions causally related to her April 29, 1998 industrial injury. EX15, p. 137. This is consistent with Claimant's abilities to drive a car with a manual transmission and pump gas into her car with the right upper extremity. See Exs. 18 and 19. Also, Claimant did not mention any psychological condition as a reason not to return to work in her personal interview with vocational expert Amy Wise in November 2001. See EX22, p. 166. He further opined that

Claimant should receive a supportive care award of two physician visits per year for one year. EX15, p. 138. As a result, Dr. Hayden released her to return to work other than that of a barber on a full time basis in the light category of physical demand. EX15, p. 138. Dr. Hayden opined that Claimant had no difficulty with feeling or with fine manipulation and found no reason to limit Claimant's overhead reaching. *Id.* Finally, he opined that while Claimant should limit her repetitive forceful grasping while she continues to have subjective right elbow complaints, there was no limit to her simple grasping. *Id.* Dr. Butler also concurred with Dr. Hayden's IME report stating that Calaimant had reached MMI as of September 12, 2001. EX20, p. 159.

Based upon the evidence, I adopt Dr. Butler's and Dr. Hayden's conclusions and find that Claimant reached maximum medical improvement with respect to her right carpal tunnel release/wrist condition as of February 12, 2001 and on September 12, 2001 as to her right elbow/epicondylectomy conditions. Dr. Butler's opinion as a treating orthopedic surgeon are consistent with Dr. Hayden's September 12, 2001 maximum medical improvement date in that he noted that despite extensive rehabilitation, no improvement had occurred with respect to Claimant's right elbow condition as of December 24, 2001 and that it was very unlikely that surgery or anything else short of nonsurgical treatments could help Claimant with her right elbow pain. CX7, p. 80. As such in the absence of contrary evidence, I follow the opinions of Drs. Hayden and Butler. Claimant's dates of maximum medical improvement are February 12, 2001 as to her wrist condition and September 12, 2001 as to her elbow problem.

VII. ***Extent of Disability***

In order to establish a prima facie case of total disability, Claimant must establish that he or she is unable to return to his or her usual work due to a work-related condition. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); s*ee also, e.g., SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57 (CRT) (5th Cir. 1996). If Claimant established that he or she cannot return to his or her usual employment, the burden shifts to employer to establish the availability of suitable alternate employment. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980). In deciding if a proffered job opportunity is realistically available, it is also necessary to consider the Claimant's age, education, and background in order to determine if there is a reasonable likelihood that the Claimant would be hired if he or she diligently sought the proposed job. *See Hairston v. Todd Shipyards*, 849 F.2d 1194 (9th Cir. 1988); *Stevens v. Director*, OWCP, 909 F.2d 1256 (9th Cir. 1990). However, an employer need not show the existence of specific and realistically available job opportunities if the employer itself offers the Claimant a bona fide job that the Claimant is capable of performing. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685 (5th Cir. 1996); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); *McCullough v. Marathon Letourneau Co.*, 22 BRBS 359, 365-66 (1989); *Peele v. Newport News Shipbuilding and DryDock Company*, 20 BRBS 133, 136 (1987); *Darden v. Newport News Shipbuilding and DryDock Company*, 18 BRBS 224, 226 (1986). If it is established that suitable alternative employment is available, the provisions of subsection 8(c)(21) of the Act require that the injured worker's compensation be based on the difference between the worker's pre-injury average weekly wage and his or her post-injury earning capacity.

While not stipulating, Employer did not argue or present any evidence in support of Claimant being able to return to her work as a barber. To the contrary, Dr. Hayden opined that Claimant is not capable of returning to work as a barber. EX15, p. 138. I adopt this opinion and find that Claimant cannot return to her prior work as a barber.

VIII. ***Retained Earning Capacity.***

Since Claimant has established that she cannot return to her regular work, she will be considered permanently totally disabled unless Employer establishes suitable alternative employment. *See Clophus v. Amoco Oroduction Co.*, 21 BRBS 261 (1988). The employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473 (1978). If the employer meets its burden and establishes suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. *See Edwards v. Director, OWCP*, 999 F.2d 1374(9th Cir. 1993); *Williams v. Halter Marine Service*, 19 BRBS 248 (1987).

The judge may rely on the testimony of vocational counselors that specific job openings exist to establish the existence of suitable jobs. *See Turney v. Bethlehem Steel Corp*., 17 BRBS 232 (1985). The counselors must identify specific available jobs; labor market surveys are not enough. *See Campbell v. Lykes Bros. Steamship Co.*, 15 BRBS 380 (1983). The judge may credit a vocational expert's opinion even if the expert did not examine the claimant, as long as the expert was aware of the claimant's age, education, industrial history, and physical limitations when exploring the local job opportunities. *See Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

Since Claimant has established that she is unable to return to her former job, Employer has the burden of showing that there are alternative jobs available to her. In this regard, Employer has submitted a report of a vocational consultant which asserts that in December 2001, various other employers within Claimant's geographic area had jobs that would provide suitable alternative employment for Claimant. EXs.22 - 28.

In an effort to show that Claimant can obtain and perform suitable alternative employment with other employers in the Tucson Metropolitan area, Employer submitted a report by vocational consultant Amy Wise which purports to show that from September 11, 2001 through January 11, 2002, the date of Ms. Wise's closing report, Claimant is qualified to work four to five positions of employment. The report states that Drs. Hayden and Butler both responded to seven job descriptions sent to them by Ms. Wise concerning Claimant's restrictions and ability to work full time at these positions. Each position was located in the Tucson area and were open at the time of Ms. Wise's inquiry in December 2001. TR, pp. 169 and 177. Ms. Wise opined that Claimant was capable of working various jobs including that of a customer service specialist at a rate of pay of $7 per hour plus bonus (EX25, p. 192), appointment setter/clerk at $8 per hour plus bonus (EX25, p. 194), leasing agent at a rate of pay of $8-$9 per hour plus bonus (EX25, p. 193),

phone reservationist at $5.75-$6 per hour (EX25, p. 196), and optical retail sales clerk at $6.25 per hour plus commission (EX25, p. 195). TR pp. 173-181. Ms. Wise found that her analysis is consistent with the various evaluations of Claimant that she reviewed in that the customer service specialist, appointment setter/clerk, and optical retail sales clerk positions are within the physical restrictions that both Claimant's treating physician, Dr. Butler, and the employer's medical evaluator, Dr. Hayden, recommended for Claimant with each doctor's restrictions taken into consideration. TR pp.172, 175, 176, 176, and 177. Dr. Butler and Ms. Wise also opined that the phone reservationist position was acceptable for Claimant given the medical restrictions from Dr. Butler. TR, pp. 177-178; see also EX22-25, and 28, pp. 162-203, 221-226.

Ms. Wise concluded that the wages that Claimant could earn during the labor market research as of December 7, 2001 is between $5.75 and $9.00 per hour. In addition, employers were asked if they had openings around the period of September 11, 2001, Claimant's approximate MMI date. In this regard, two of the six companies had positions available during this period. The wages ranged from $7.00 to $8.00 per hour. (EX28, p. 223) Because there is no evidence as to which specific employers were willing to pay between $ 7.00 and $ 8.00 per hour as of September 12, 2001, I find that the appropriate range of wages per hour is $ 5.75 to $ 9.00 as of December 7, 2001.

With respect to Claimant's alleged psychological limitations, Ms. Wise testified that she did not take any psychological condition into consideration in her analysis. TR p.182. Both Ms. Wise and Dr. Schoenhals testified that the dosage of anti-depressant medication taken by Claimant for her depression had no side effects to interfere with Claimant's job prospects. TR, pp. 89 and 184.

On September 12, 2001, Dr. Hayden released her to return to work other than that of a barber on a full time basis in the light category of physical demand. EX15, p. 138. Dr. Hayden opined that Claimant had no difficulty with feeling or with fine manipulation and found no reason to limit Claimant's overhead reaching. *Id.* Finally, he opined that while Claimant should limit her repetitive forceful grasping while she continues to have subjective right elbow complaints, there was no limit to her simple grasping. *Id.* Dr. Butler also concurred with Dr. Hayden's IME report stating that Claimant had reached MMI as of September 12, 2001. EX20, p. 159. Given Claimant's ability to drive a stick shift with her right arm, pump gas with her right arm, her omission of reference of psychological problems as a reason not to work to Ms. Wise, and her focused demeanor and ability to testify at hearing, I find that Claimant can effectively work jobs at the light range of physical demands and exertion level. I again find that for reasons referenced above, Claimant was not credible in her statements that she is unable to type, unable to grasp, unable to write legibly, or has difficulties in concentrating and working an eight-hour day in the positions approved by Dr Hayden and her treating physician, Dr. Butler.

As a result, it seems likely that a number of the positions listed by Ms. Wise would be consistent with the Claimant's limitations since they all involve light exertion levels. As referenced above, these positions paid in the range of $ 5.75 to $ 9.00 per hour on December 7, 2001 soon after Claimant reached MMI. Since three positions were acceptable to both Dr.

Butler and Dr. Hayden (the appointment setter clerk, optical retail sales clerk, and customer service specialist) at pay rates that averaged approximately $7.00 per hour, I find that on December 7, 2001, Claimant had an earning capacity in the range of $ 280 per week ($7.00 x 40 hours).

In calculating a claimant's entitlement to temporary partial disability benefits since September 12, 2001, it is necessary to adjust his current earning capacity to account for any wage inflation that may have occurred between the date of his work injury manifestation and the date that suitable alternative employment became available. *See Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691, 695 (1980); *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 321 (D.C. Cir. 1986). Ordinarily, this adjustment should be made by determining the wage level that prevailed for the alternative employment at the time of the claimant's work-related injury. However, no such evidence is contained in this record. Accordingly, the necessary adjustment must be made by decreasing the claimant's current residual wage earning capacity by an amount proportionate to the increase in the National Average Weekly Wage (NAWW) since the date of the claimant's work injury. See Richardson v. General Dynamics Corp., 23 BRBS 327 (1990). Data published by the Department of Labor show that the NAWW increased from $466.91 on October 1, 2000 to $498.27 on October 1, 2002. Therefore, when adjusted to reflect the changes in the NAWW, Claimant's November 19, 2002 residual wage earning capacity of $320 was equivalent to a weekly wage of $299.85 in May 2001. Claimant's loss of wage earning capacity is thus $316.06 per week (his average weekly wage of $615.91 minus $299.85). Therefore, on May 4, 2001 Claimant's entitlement to permanent partial disability benefits equal to two-thirds of $316.06, i.e., $210.71 per week.

IX. ***Interest.***

Interest on a disability award is mandatory. *Sproull v. Director, OWCP*, 86 F.3d 895,900 (9th Cir. 1996); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir. 1991). Nevertheless, Employer did not receive proper notice of Clamant's right upper extremity injury until September 2000 when Claimant stopped working due to her outsourced job. I find that Employer would suffer undue detriment if it were required to pay interest accruing from April 29, 1998 when it had no notice that an injury had occurred. Therefore, I find that total interest accrued from September 25, 2001, the date that Employer filed its Notice of Controversion as to both injuries. See EX1, p.4.

ORDER

1. Employer shall pay Claimant temporary total disability compensation for the period beginning on October 18, 2000 and ending on December 6, 2001 at the rate of $239.07 per week (i.e., two-thirds of Claimant's average weekly wage of $358.60($172.60 base + $ 186.00 Dillard's)).

2. Beginning on December 7, 2001, the date of Employer's labor market survey, and until such time as ordered otherwise, Employer shall pay Claimant permanent partial disability compensation of $78.60 per week ($358.60 - $280.00).

3. Employer shall reimburse Claimant for out-of-pocket medical expenses totaling $355.11.

4. Employer shall pay interest on each unpaid installment of compensation from October 18, 2000 until February 6, 2001, the date of actual payment at the rates prescribed under the provisions of 28 U.S.C. § 1961.

5. Employer shall receive a credit for any compensation paid to Claimant since October 18, 2000.

6. The District Director shall make all calculations necessary to carry out this order.

7. Employer will provide future medical benefits consisting of a supportive care award of two physician visits per year for one year.

8. Counsel for Claimant shall within 20 days after service of this Order submit a fully supported application for costs and fees to counsel for Employer and to the undersigned Administrative Law Judge. Within 20 days thereafter, counsel for Employer shall provide Claimant's counsel and the undersigned Administrative Law Judge with a written list specifically describing each and every objection to the proposed fees and costs. Within 20 days after receipt of such objections, Claimant's counsel shall verbally discuss each of the objections with counsel for Employer. If the two counsel disagree on any of the proposed fees or costs, Claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are still in dispute and set forth a statement of Claimant's position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by counsel for Employer. Counsel for Employer shall have 15 days from the date of service of such application in which to respond. No reply will be permitted unless specifically authorized in advance.

IT IS SO ORDERED.

A

Gerald Michael Etchingham
Administrative Law Judge

San Francisco, California